IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

MOMS FOR LIBERTY – BREVARD COUNTY, FL, et al.

Plaintiffs,

CASE NO.: 6:21-cv-1849-RBD-GJK

vs.

BREVARD PUBLIC SCHOOLS, et al.,

Defendants.
_____/

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT (DOC. 90) AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs twist Defendants' words in an effort to convince the Court that Plaintiffs' characterization of the facts is undisputed. As repeatedly demonstrated by Defendants' arguments advanced in this case, Defendants dispute that Belford applies the Policy to prevent "offense" to audience members, as opposed to applying it to ensure orderly meetings. Defendants also dispute that Plaintiffs "self-censor" their speech, particularly in light of their frequent remarks at Board meetings that go uninterrupted.

The Court can easily glean the actual material facts in this matter from the videos of the Board meetings at issue, which demonstrate that Defendants apply the Policy in a reasonable and viewpoint-neutral manner. It is apparent from the videos, Belford's affidavit and deposition testimony, and the

deposition testimony of the Plaintiffs that Defendants apply the Policy to prevent disruption at Board meetings and that Plaintiffs' speech is not objectively chilled.

ARGUMENT

A. Defendants Dispute Plaintiffs' Characterization of the Material Facts.

This case is appropriate for summary judgment in Defendants' favor because the actual material facts are beyond dispute. The Court can observe the videos of Board meetings and ascertain the manner in which Defendants applied the Policy, regardless of the hyperbolic rhetoric extended by Plaintiffs.

Defendants dispute Plaintiffs' characterization of the facts. Plaintiffs rely heavily on Belford's deposition testimony that when applying the Policy, she takes into account audience unrest such as shouting during public comments. Belford repeatedly tied this to her desire to maintain decorum in the Boardroom, not to attempting to prevent "offense" to audience members. (*See* Belford Tr. at 159:17-25, 161:14-24, 167:10-13, 169:5-13, 171:12-20, 185:10-15.) If anything, this demonstrates Belford's efforts to allow commenters to present a wide swathe of viewpoints on a variety of issues—even when comments are irrelevant, negative, or even hostile, Board meeting videos demonstrate that Belford allows such comments to go uninterrupted so long as they do not disrupt the orderly nature of the Board meetings. (*See, e.g.*,

Doc. 20 at 16-17, 20-22, 24-25, 30-32, 44, 48-49, 69-74.)

As for Plaintiffs' claim that they "self-censor," Plaintiffs failed to identify a single viewpoint that they were unable to express at Board meetings. Kneessy and Hall complained about not being able to call out individual Board members or BPS staff by name. (*See* Kneessy Tr., Doc. 91-5, at 43:17-44:1; Hall Tr., Doc. 91-2, at 18:23-19:4.) However, the record demonstrates numerous instances of public commenters addressing Board members without violating the "personally-directed" provision of the Policy, with the commenters delivering their statements uninterrupted. (*See* Doc. 20 at ¶¶ 79, 145, 151, 162, 171, 173, 183, 188, 192, 197, 204, 223.) Hall also claimed that she "probably" refrained from addressing "the books that are in the libraries," but the only book-related issue that Plaintiffs have identified is an MFL member being interrupted when reading a sexually suggestive passage from a book that she claimed was inappropriate for school libraries. Hall never actually attempted to speak about books available in public schools. (Hall Tr. at 19:8-9.) Cholewa could not identify any viewpoint that he stopped himself from expressing; instead, he took issue with the break in momentum that an interruption from the Chair could cause. (See Cholewa Tr., Doc. 91-4, at 40:21-41:24.) Delaney claimed that she was "not able to comment the way that she would have liked" because of the possibility of being removed, trespassed, fined, or arrested, but acknowledged that she commented at Board meetings on topics as wide-

ranging as mask mandates, critical race theory, and transgender guidelines. (Delaney Tr., attached hereto as **Exhibit A**, at 15:16-16:15.)

Even if Plaintiffs "self-censor" as they claim, the question of whether a viewpoint-neutral policy is constitutional as applied is not subjective. It is objective. *See Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1121 (11th Cir. 2022) (analyzing whether discriminatory harassment policy "objectively chills" speech). For the application of the Policy to cause an "objective chill," it must cause a *reasonable* speaker to fear expressing her viewpoints. *See id.* For the reasons discussed in Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment ("Defendants' Response") (Doc. 95 at 16-20), no reasonable speaker would fear expressing a viewpoint at Board meetings.

Finally, as discussed in Defendants' Response, Defendants do not concede that Plaintiffs' speech is protected. The Court previously found the Policy to be facially constitutional, and Plaintiffs' violations of that constitutional Policy are not protected speech. *See Charnley v. Town of S. Palm Beach*, No. 13-81203-Civ-Rosenberg/Hopkins, 2015 WL 12999749, *8 (S.D. Fla. Mar. 23, 2015) ("*Charnley I*"), *report and recommendation adopted*, 2015 WL 12999750 (S.D. Fla. Apr. 9, 2015), *aff'd*, *Charnley v. Town of S. Palm Beach, Fla.*, 649 F. App'x 874 (11th Cir. 2016) (plaintiff's violations of township meeting policy were "not protected, and thus, her First Amendment rights were not violated"). Furthermore, despite Plaintiffs' characterization

otherwise, Plaintiffs do not limit their speech to school-related matters, as is apparent from the litany of topics that Plaintiffs frequently address at Board meetings. One such example is Cholewa's interrupted diatribe regarding the Democratic party as accepting the murder of full-term babies, and parents of transgender children displaying their offspring "like a fashion accessory." (Doc. 20 at ¶¶ 193, 195.)

In summary, the so-called "undisputed facts" identified by Plaintiffs are, in fact, disputed, but it is not the actual facts of the case themselves that Defendants dispute—it is Plaintiffs' characterization of these facts. The Court should therefore reject Plaintiffs' portrayal of the actual undisputed facts and find that summary judgment for Defendants is proper.

B. Defendants—and the Court—Sufficiently Understand Viewpoint Discrimination.

In their Response, Plaintiffs take issue with Defendants' "understanding" of viewpoint discrimination, arguing that Defendants' perception is "too narrow." (Doc. 96 at 5-6.) In particular, Plaintiffs criticize Defendants' statement that "the Policy is 'evenhandedly applied as a whole' to all viewpoints." (*Id.* at 6.) In their Motion for Summary Judgment, Defendants lifted this language directly from the Court's order denying Plaintiffs' Motion for Preliminary Injunction, in which the Court found that Plaintiffs are unlikely to prevail in their as-applied challenge. (*Compare* Doc. 46 at 7 *with*

Doc. 90 at 18.) Defendants venture to argue that they and the Court alike "understand" the nature of viewpoint discrimination as outlined by the Supreme Court and the Eleventh Circuit.

In recognizing that the Policy is "evenhandedly applied as a whole," the Court cited to *Cleveland v. City of Cocoa Beach, Fla.*, 221 F. App'x 875 (11th Cir. 2007). There, the Eleventh Circuit examined a policy that prevented campaign promotions at city council meetings and found that where a mayor applied the policy "evenhandedly" to all viewpoints—including to the promotion of her own campaign—the policy was constitutional as-applied. *See id.* at 879.

Defendants likewise apply the Policy to all viewpoints presented at Board meetings, whether they be positive or negative, for or against an issue. As demonstrated by the evidence cited in Defendants' Motion for Summary Judgment and Defendants' Response, Defendants' consistent goal is the maintenance of order and decorum to allow the Board to conduct its business. Plaintiffs are free to express their views so long as they do not violate the facially constitutional Policy. The Court should find that the undisputed facts demonstrate this to be the case and enter summary judgment in favor of Defendants.

CONCLUSION

While the actual facts of this case are independently verifiable by the

Court based on the record evidence, Plaintiffs' characterization of those facts is skewed and inaccurate. The Court should find that Defendants do not apply the Policy in a manner that discriminates based on viewpoint or in an effort to avoid "offense," but rather to ensure orderly Board meetings. The Court should also find that under an objective standard, no reasonable speaker would fear presenting comments at Board meetings under Belford's application of the Policy. For these reasons, summary judgment for Defendants is appropriate.

WHEREFORE, Defendants respectfully request that the Court grant Defendants' Motion for Summary Judgment.

Respectfully submitted this 6th day of October, 2022.

/s/Gennifer L. Bridges
HOWARD S. MARKS
Florida Bar No.: 0750085
Email: hmarks@burr.com
Secondary Email: echaves@burr.com
GENNIFER L. BRIDGES
Florida Bar No.: 0072333
Email: gbridges@burr.com
Secondary Email: nwmosley@burr.com
SHEENA A. THAKRAR
Florida Bar No. 871141
Email: sthakrar@burr.com
Secondary Email: echaves@burr.com
BURR & FORMAN LLP
200 S. Orange Avenue, Suite 800
Orlando, Florida 32801
Tel: (407) 540-6600
Fax: (407) 540-6601
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 2022, a true and correct copy of the foregoing was filed via the CM/ECF system, which will provide electronic notice to the following counsel of record:

David Osborne (dosborne@goldsteinlp.com)
Goldstein Law Partners, LLC
4651 Salisbury Rd., Suite 400, Jacksonville, FL 32256

Ryan Morrison (rmorrison@ifs.org)
Martha Astor (astorm@ifs.org)
Institute for Free Speech
1150 Connecticut Ave., NW, Suite 801, Washington, DC 20036

/s/Gennifer L. Bridges
Gennifer L. Bridges (FBN 0072333)